EIGHTH CIRCUIT JUDICIAL CONFERENCE
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Remarks of the Honorable Harry A. Blackmun
Associate Justice
United States Supreme Court

Hon. James B. Loken: Our last speaker truly needs no introduction. He has been our Circuit Justice for over twenty years now and has provided inspiration and leadership and guidance to many, many more of these conferences than I have been fortunate enough to attend. And he has graced us with his presence again this morning. I know we are all looking forward to his annual review of the state of the Supreme Court and the legal profession. I give you Justice Harry Blackmun.

Hon. Harry A. Blackmun: I regret the delay. My moments don't seem to be my own around here this morning, but, anyway, we are on the way. Mr. Chairman Chief Judge Arnold, Mr. Solicitor General, Justice Simonett, Chief Justice Keith--now Sandy, don't complain because I put Justice Simonett first because he was a speaker after all, my colleagues of the state benches, my colleagues of the federal benches, distinguished guests, and as I always say I hope friends.

It is a privilege always to be at the Eighth Circuit Conference, whether it is in St. Louis or Colorado Springs or Kansas City or here or as it will be in Des Moines in a couple of years in Iowa. I haven't missed very many since 1970 and indeed since before then since 1959. I well remember one time I did miss one in Lutsen when these conferences used to be held in June and we couldn't get away from Washington and Dottie, Mrs. Blackmun, came out and stood in for me and all my friends said after this, you stay home and Dottie come out. Thus it always has been in my lifetime.

It is especially good, if you will pardon a personal reference, to be in Minnesota. This is where I grew up over on the east side in St. Paul. Warren Burger and Ed Devitt and I were

living, I suppose, within four blocks of each other. Ed was a little younger than the other two of us. We went to the same grade school and then seventeen years of very happy practice in this city which was so good to Dottie and to me and where we built our first home out in Golden Valley only to live in it for just a few days. Dottie I think three months and I about two nights before we moved on to Rochester to try something else. And then the happy decade that we had with the Mayo organizations in Rochester. I have said that that decade was the happiest decade of my professional life, for a number of personal reasons I suppose, but it enabled me to have one foot in the medical camp and the other one in the legal camp and the memories are very pleasant ones. Minnesota means much to Dottie and to me and this indeed is home in many respects.

I think this is the twenty-second conference, my goodness that is a long time, as Circuit Justice and Chief Judge Arnold, all you have to do really is to write the Chief Justice because he makes the assignment and tell him you want something new. I think he will comply. I won't guarantee what you will get. He will comply.

You know I have two hard acts to follow this morning. The Solicitor General is very able, very articulate, and an excellent speaker and for some reason at this Conference that has been my sad state. I in the past have always followed Bill Webster and he is a tough act to follow. And then John Simonett this morning was another one. And you will just have to bear through this and I apologize for my deficiencies.

In the past I have shared with you a few letters that come in once in a while and maybe it is a bad habit but let me do it again. This one came in just the last day of the session of the term two weeks ago last Monday. "Dear Harry, I hope you decide to leave the Supreme Court as soon as possible because as soon as possible isn't soon enough. You are nothing but a low down scum voting with Kennedy on the graduation prayer decision. Signed an American Patriot." Well, Mr. Chairman, I think they enjoy my being insulted. Here is another one that came in from Sacramento. "Dear Sir, The weather is fine, but I can't see. I wish you were here.

Eternally yours." Mr. Chief Justice Keith, you advise me how to answer that one.

Another one, "Dear Chief Justice," I love these because I send them down the hall and whoever is chief gets sort of burned up about it. "Could you please give me an appointment for around the 8th of January so that I might get my grandchildren cleaned up. This would end the matter as I am sure you would be glad unless you wanted to continue it. Yours respectfully, Peggy Burke." Well, those poor grandchildren . . .

And just a couple more and I will stop boring you with these. "Dear Judge, there is a rotten school teacher in Las Cruces, New Mexico, named Anthony Chevaz. Very truly yours, William R. Marshall."

And one last one--"why don't you just retire and clear the way for real intelligence. We have had your left wing crap crammed down our throats for far too long. You are worthless to the American scene." And I have been waiting to read this in Minneapolis, "maybe the Swedes can use you. You just don't fit. Signed, one of an ever growing cadre of dump Blackmun America."

Well, they brighten my day and especially do they brighten my wonderful secretary's day. She comes in and brings them in like this with a big smile on her face.

Well to be a little bit more formal and more serious. I offer my congratulations and tribute to Chief Judge Arnold on taking on the leadership of the Court of Appeals for the Eighth Circuit. I think he is the third Arkansan to hold that position. The original one Henry C. Caldwell back in 1891 and then Judge Pat Mehaffy, a dear friend during my court of appeals days, and now Richard Arnold. The Chief, the present Chief, I think, is the as I count it the twelfth chief judge of the Eighth Circuit. We used to call them senior judges in the old days. Let me just read them--Henry C. Caldwell whom Pat Mehaffy said never was an Arkansan anyway. He was nothing but a Yankee carpetbagger who went down there. Walter H. Sanborn, Kimbrough Stone, Archibald K. Gardner, Harvey M. Johnsen, Charles J. Vogel, Martin D. Van Oosterhout, M.C.

Matthes, Pat Mehaffy, Floyd R. Gibson, and Donald P. Lay and now Richard Arnold. I think I have them all. What a great list of chief judges of a great court. It bothered me a little bit that I knew all except the first two. And Judge Loken I might say that Minnesota has had only one Chief Judge and that was Walter H. Sanborn. So hang on and you will be the next Minnesotan to be a chief judge if you stay long enough. But, certainly Richard Arnold has my best wishes and I know he has the best wishes of all of us.

I would like just to say a word in passing of a recent departure from our ranks of Katherine Mehaffy Dixon of Little Rock. Pat Mehaffy's widow and a good friend, one who always attended these conferences when she could. Our friends do slip away.

Well, what about the year. I see the subject assigned to me is Supreme Court review. The Solicitor General has presented in his approach a very excellent review of Supreme Court decisions this year and in fact saw many of the facets of the Court's work that probably had escaped my attention. I am too close to it and what alarms me is that the cases he cited, a number of them I wrote and I am not sure he approved of all of them, but that is the way it goes I suppose.

Two years ago when I was returning from the 1990 Conference on July 20 of that year and was driving, as we intend to do, back into Northwestern Wisconsin, I heard on the car radio that night of the retirement of William J. Brennan, Jr., and then, of course in the summer of 1991 this was followed by the retirement of Thurgood Marshall. And those two old champions of so-called liberalism were gone and the stage was set for something different. And then came the Clarence Thomas nomination with the announcement from Kennebunkport, Maine, and the ensuing hearings that I am sure as lawyers and judges you all well remember of last summer. The stress on Roe against Wade which the nominee denied ever having read or considered at the time when he was in law school and the appearance of Professor Anita Hill and witnesses pro and con--some prominent and others not so prominent. And with Judge Thomas finally saying in desperation and so accurately and appropriately

that this has got to stop. And the fifty-two to forty-eight vote which is I think the closest for a confirmation certainly in this century and maybe in history on the confirmation side. And then the soon to follow ceremony in the Rose Garden with Judge Thomas becoming Justice Thomas. The timing was such that the Justice could not sit the first week in October, the first week of that session, but he did sit the second and from then on. I think had I been he, being a weaker person I suppose, I would have told the Chief Justice go ahead with October and I will start with November and let me recover a little bit from the strain of these hearings.

I suppose it is not improper to say that those stressful hearings in there way set the tone for the Court for the year. Stressful for all concerned--certainly for Clarence Thomas, certainly for Mrs. Thomas, certainly for his family, for the political structure, for the Judiciary Committee, for the Congress, for the President, and indeed for your Supreme Court. And let me say at this point that the Court, when it assembles for conference at a time such as that, really says very little about how nomination hearings are progressing. And I think this is proper because who succeeds in a vacancy is very little of the Court's business. We have no right to dictate who comes on. That is the responsibility of the appointing president and of the advising and consenting United States Senate. But the term began and the Court's life went on. It was saddened by the death of the Chief Justice's wife Nancy, or Nan. It saddened all of us. She succumbed finally as you know to, after a valiant battle with cancer. It was further saddened by the revelation by John Paul Stevens of the presence of a prostatic condition, cancer, and the necessity for radiation treatments. It hasn't seemed to affect him any. He is still as bright and cheerful as ever. He said it is a little wearing once in a while. I can speak to that myself. I can say there is something wrong with all us. Maybe that is true always of the Court because we are all kind of old, but the Chief has his back problems, and Byron White has his back problems, and I have had mine, and John Stevens and Sandra O'Connor have

struggled with their respective illnesses. As far as I know it is only the younger people that are whole physically and I am not too sure about them at times.

Other events of the year. Certainly dominant. And I mention these every year because I think they do affect the Court's work in a way. The profound changes in what was the Soviet Union, indeed its collapse; increased tensions in the Middle East; war in the Baltics; trouble in Pakistan. The pressure, and I hope you will not misunderstand this, the pressure that came upon us to get the Kasey case, the last abortion case on in April. Pressure seemingly from both sides and certainly from one side, I suppose to make an election issue out of it, that seemed to be there in the atmosphere above us most of the year. And, of course, we had the usual election year pressures. I don't mean the political things, but the ones that come up every four years and are absent in between. Cases regarding redistricting; access to the ballot; and this year census counting of military people overseas. All of these are under pressure, get them decided in a hurry and it does I think characterize the term. But we finally ended up on the 29th day of June two weeks ago Monday, with the announcement at last of the Lucas and Kasey cases on that day. Justice Kennedy took off for Salzburg that evening and told me that he was glad to get out of town. We all scattered in a hurry. I think it is good for us to get away from each other once in a while in these recess days.

Statistics--these are the final ones for the term. Docketing during the term on the paid side 2,086 on IFP 3,779, a total of 5,865 cases. A record I think. The Solicitor General referred to this. A year ago it was 5,500. Two years ago it was 4,900. This year 5,865. You can figure out how many that is a week. They follow me out here wherever I am and I find I have to keep at them every day or I will be sinking in a sea of paper.

Disposals, and I include cases in which certiorari has been granted in this figure, 5,824. Another record. Up from 5,421 a year ago. So I think your Supreme Court is working hard, trying to stay abreast and while the pending caseload increased a little,

it wasn't very much, only 41. Cert grant in hours of argument, not in numbers of cases, so far 112 last year compared with 126 the year before, 115 two years ago. Signed opinions only 107, one of the lowest figures certainly in a long time, 15 less than a year ago, 22 less than two years ago. Four cases were set for reargument. Not very uncommon, rather common as a matter of fact when we have a new Justice on the Court. There were seventeen when I went down there after an eight many court for a full year.

The hours of cases available are 64 and that would exactly fill the October, November, December calendars. But that would leave, if we put all of those cases on in those three sessions, it would leave very little space for the January session when cert is granted the first Monday in October. There would barely be time in the briefing schedule to get them on in January. And so we are lightening a little the October calendar. Instead of 24 cases I think it will be about 21 and the same thing I am sure will happen in November and December so we can fill the January calendar and keep things rather even.

Why the lessening in the grants of cert and the cases heard? The Solicitor General certainly put his finger on a very vital factor and that is the elimination of the right to appeal jurisdictional cases. It has helped tremendously because for a number of years I have heard the comment around the conference table, well if this were a cert, I would deny it, but being a jurisdictional statement, we almost had to take it unless we could dispose of it summarily. I think myself a factor, I am not sure others will agree with me, in the increase of the IFP petition number is wrestling with the sentencing guidelines. Every prisoner thinks he should not have ten years, he ought to have eight and so we have a petition. We say often that my the list this week is a thin list and there have been a couple of cynical comments to the effect are lawyers taking thin cases just to get a few more billable hours on it. I will leave that for you to decide. And then there is the general comment that because so many federal judges have been appointed by the Reagan and Bush Administrations

and with the so-called conservatives in control of the Court, there is less disagreement and hence less of a need to take cases by way of the grant of certiorari. One might make an argument out of that one by saying that the Ninth Circuit produces again the most cert grants that we have had and as you know, there are a lot of Carter appointees out there and maybe there is a factor there. Otherwise I am not sure why these things have moved along that way.

Eighth Circuit statistics this year from this circuit 416 of which 338 came from the court of appeals and 74 from state courts within the Eighth Circuit. Those numbers are up a little bit from a year ago. Again this year the Eighth is in a standoff with the Seventh. Roughly the same volume. That, of course, is a three-state jurisdiction whereas ours is a seven-state jurisdiction. But one note of notable difference is that there are fewer cases from the court of appeals in the Seventh Circuit and more from the state courts there. I think most of those come in from the state courts of the State of Illinois.

This circuit ranks number seven among the volume among thirteen circuits. The one that produces the most grants is the Ninth Circuit as I have indicated. The second is the Fifth, and the third is the Eleventh. Of the sixty-six pending grants, five are from the Eighth Circuit. They will be heard this coming term. I will just name them, I won't say what they are about: Reves against Ernest and Young, a civil case; ?Larkhart against Fretwell?, federal habeas; Growe Secretary of State of Minnesota against Anderson where jurisdiction was noted, a voting rights case with minority representation questions; and then Alexander against the United States and Crosby against the United States, two criminal cases.

Cases from the Eighth Circuit that were decided, I will just mention them briefly, we usually do. That sad case of Jacobson against the United States, the Nebraska farmer who had ordered a Bear Boys magazine and was charged with child pornography violations. This causes a lot of trouble and we reversed the Eighth Circuit there with a divided vote. The opinion was by Byron

White, Sandra filed a dissent and was joined there by the Chief and Kennedy and Scalia for the most part. A very hard, difficult case. United States against R.L.C., sentencing of a juvenile. And the court of appeals had rejected the plain meaning analysis proffered by the SG and the opinion is by, well our Court affirmed that judgment, and the opinion is by David Souter and Nino Scalia joined by Kennedy, and Clarence Thomas went off on the rule of lenity and Sandra O'Connor filed a dissent in which I joined. At least I am on the side of the Eighth Circuit in that case. Lujan against the Defenders of Wildlife, I thought was an unfortunate decision, of course, but I am thinking a lot in the vain recently I noticed and this concerned regulations by the Secretary of the Interior and the Secretary of Commerce regarding the Endangered Species Act and the geographic scope of it whether it was restricted to the United States and the high seas or could apply abroad. The district court dismissed the suit for lack of standing. The Eighth Circuit reversed and when it came to our Court, it reversed with an opinion by Scalia that concluded that the respondents lacked standing to seek judicial review. Well, I filed a dissent trying to keep the majority honest and Sandra joined it and so it was. And then as was mentioned this morning the St. Paul cross burning case. A very spirited argument. This hit home because I knew the area in St. Paul was near where I grew up. I knew it well. I had a little fun about Mounds Park in the weeds and couldn't help but ask the district attorney where on Earl Street did this happen. Well he wasn't sure and I said, "was it near Mounds Park or near Phalen Park" and, not that it made any difference, you know judicial humor is really pretty bad, and you have to reach for it when it presents itself but, anyway, the Court held unanimously, but by fractured approaches, that the St. Paul ordinance was invalid under the First Amendment. I think the door remained open for a proper ordinance but it was a refreshing case, well argued, and particularly meaningful to me at that time.

Other cases of import of the term, I will mention these rather hurriedly, some of them had been mentioned by the Solicitor General

this morning. ?Lee against Wiseman?, the prayer at a commencement exercise of a middle school in Providence, Rhode Island. Was this the employment of a clergyman, happened to be a Rabbi here, violative of the First Amendment? In a way it was a good case to bring because it was pretty narrow and not at all sensational. The principal had asked the Rabbi to give the invocation on the benediction and told him in effect what he should say. Keep it nonsectarian and indeed he did but the Court held in an opinion by Justice Kennedy that this was violative of the First Amendment. It has produced a lot of mail one or two letters of which I wrote. I had a little fun with counsel, Solicitor General Starr argued together with Mr. Cooper and my comment now concerns Mr. Cooper not the Solicitor General. There was a sentence in the benediction which counsel referred to that woke me up. We must each strive to fulfill what you require of us all--to do justly, to love mercy, to walk humbly. And I inquired of counsel when he was about ready to sit down, "did you say this had no scriptural base?" "That's correct." Well, let me read to you from the eight verse of the sixth chapter of the Prophet Micah, "what does the Lord require of you but to do justice, to love mercy, and to walk humbly with your God." Again pretty poor humor but it was a lot of fun anyway.

Lucas against the South Carolina Costal Corporation I think is of interest to you who are engaged in commercial and business law. This was a question of whether South Carolina restrictions on building on a barrier island near the beach was a taking that was entitled the owner to compensation. The question was whether a ban on construction deprived the owner of all economically viable use, that is a misuse of the term viable, of course, but that was the issue and the Court allowed, our Court did anyway, that it was that. Justice Scalia wrote the opinion and got the five votes and John Stevens and I filed dissents and thought it was wrong but then so it goes.

And then, of course, we had the inevitable Krishna case involving the issue whether an airport is a public forum and whether airport regulations restricting solicitation on leafleting

by the members of that organization was violative of the First Amendment. We came out, * * * the Second Circuit had ruled that the terminals are not public forums and that the ban on solicitation was reasonable but the ban on distribution of literature was unreasonable and Court affirmed. Those cases have been very difficult. This is not the first one having to do with airport activity. You tell me whether that should be a public forum or not.

Suter against Artist M. which had to do with a class of abused and neglected children and a suit under 1983, the favorite statute of everybody. The Court held that Congress did not create a federal right enforceable under that statute. Again John Stevens and I were in dissent and we thought that the Court had failed to apply the established test for when a federal statute has created an enforceable right and that the decision violated twenty-two years of precedent.

The ?Chipoloni? case, I mispronounce that I am sure. The suit against the cigarette companies which the Solicitor General referred to was reargued. Argued first in October and then reargued in January and decided in late June. This was an issue whether New Jersey common law obligations failure to warn consumers about hazardous cigarette smoking and the like was preempted by federal statutes of 1965 and '69. Not an easy case and we came out with different results as to the two statutes but that would be of interest to you, I think, if you are representing cigarette companies.

The Mississippi case and the dual system of higher education has been mentioned more than once and I will just go over that. Again a fractured court. And then United States against Alvarez Machain. This is the situation where the respondent was a citizen of Mexico. He was forcibly kidnapped from his home and flown by private plane to Texas where he was arrested for his participation in the kidnapping and murder of a DEA agent in Mexico. The district court dismissed the indictment on the ground that it violated the Extradition Treaty between the United States and

Mexico. The Ninth Circuit affirmed and it was impressed by the fact that the Mexican government protested what it felt was a violation of the Treaty. And our Court reversed, strangely enough in my view, by a six to three vote and it held that the facts of his forcible abduction did not prevent his trial in the United States for violation of this country's criminal laws. Well, I often wonder what kind of noise we would make if Mexico came up and arrested an American citizen in this country and took him to Mexico and tried him there on charges just the opposite of that factual coin.

Foucha against Louisiana--under state law a defendant found not guilty by reason of insanity may be committed to a psychiatric hospital. And thereafter again under state if a review committee recommends he be released, the trial court holds a hearing to determine whether he is dangerous to himself or others. And if he is found to be dangerous, he may be returned to the hospital whether or not he is mentally ill. And the issue there was did he have to be both dangerous and mentally ill in order to receive or to be kept in continued retention? Our Court held that the defendant may be held as long as he is both mentally ill and dangerous.

The ?Kasey? case. Here it is. Here it is. I think it is 111 pages of all kinds of writing. You can find anything you like there and you can find all that you dislike there I am sure but I think it demonstrates what I tried to indicate before, how this case seen by its bruiting presence to influence the term in its way. General Starr has very accurately described it and its possible effects. It may or may not prove to be a very significant case in constitutional law as the years go by and I suppose the significant things about it are that the trica, the three Justices of O'Connor, Kennedy, and Souter, reaffirmed Roe against Wade, and reaffirmed it, and reaffirmed it I think three or four times in their joint opinion and yet overruled in part the Thornburgh case and ?Akron? cases which had come along after Roe against Wade and set forth for them a standard of undue burden. Justice Stevens and

I respectively joined a good bit of that joint opinion but not all of it because certainly we feel that the standard of strict scrutiny should continue to apply. Implicit in my writing at least is the fact, and I wish, perhaps I should have stated it more clearly but I am not at all sure about that, is the implication that the undue burden approach is going to create all kinds of litigation. What is an undue burden and that in due course, it may take years, but that in due course the three justices may realize that that standard is unworkable and revert to the strict scrutiny approach. There is a lot to be said about that case. How it worked its way through the conference and deliberations and several drafts and the like. I won't go into that. I shouldn't I suppose. We have a flat dissent by the Chief with White, Scalia, and Thomas concurring in the judgment stating that they would overrule Roe against Wade. Nothing very surprising. The Chief Justice and White, of course, had that position back in 1973 and they have adhered to it. Scalia has said before that he would overrule Roe against Wade, has no business in the federal courts, it ought to be in the state legislature. And Justice Thomas joined them.

Quill Corporation which came to us from the Supreme Court of North Dakota, mail order houses and subjectibility under state law of the state use tax. As I recall Nick Spaeth, the attorney general, argued the case. He always comes down and does a good job and we are glad to see him even though Justice White, for whom he had clerked a number of years ago, likes to pick on him a little bit.

Riggins against Nevada I think is worth looking at. There the petitioner was awaiting trial for murder and he complained of hearing voices and the psychiatrist prescribed an antipsychotic drug * * * and this had an effect on him and he was found competent to stand trial, but he moved to suspend the administration of the drug until after his trial and argued that its use infringed upon his freedom and that he had the right to show jurors his true mental state when he offered an insanity defense. The trial court denied that motion. He was convicted and sentenced to death and

the state supreme court affirmed. Our Court reversed and held that the forced administration of medication during trial violated the petitioner's Sixth and Fourteenth Amendment rights. The opinion is by Justice O'Connor. Justice Thomas dissented and was joined for the most part by Justice Scalia which prompted a nasty editorial by the Washington Post.

Reference was made this morning, of course, to the antitrust case, Eastman Kodak which fell on my desk much to my initial distress, but we got through it I think and those of you who are interested in antitrust I think should take a look at that because it opens up some avenues that perhaps were thought to be closed.

Well, with all that as background, where do we stand. Now these comments from here on in are personal. They are somewhat intimate. I have always done this out at the Eighth Circuit and I always get in trouble. The media picks it up and I get nasty letters from even federal judges who say I shouldn't talk about my colleagues this way. But I make no particular apology for doing this because I feel I am generally among friends here and as a person and as a citizen, I have a right to my impressions though some might say I have no write to speak out on them. But here it goes anyway.

I am very much aware of my age and went so far as in the ?Kasey? case to mention it. That has prompted a lot of media inquiry. Even today a reporter here said flatly, "when are you going to retire?" The Court I thought, the term I thought was extraordinarily difficult and Dottie says, well, you say that every year. And Bill Webster reminded me, you say that every year. But because of the two changes in personnel in two years I think the dynamics are different. This is always true, no matter who comes on the Court. When Potter Stewart retired and Sandra came on, it happened because I knew generally how Potter Stewart would vote. I didn't know how Sandra would vote for a year perhaps. And the pressures of the confirmation process and its affect upon all of us had to be there. And the pressures of the ?Kasey? case with its urgency to be heard and the ability only to get heard in April,

we couldn't get it on earlier than that, I think hung over us to what I referred to a little while ago as its bruiting presence with its seemingly political overtone contributed to the difficulty of the term.

And then there are the inevitable questions which the media asks, which I am sure you ask. Some of you have made inquiry. Is the Court moving further to the right and hardening in its conservatism so far as civil rights and human rights are concerned? Is the Court cutting back on federal protection of civil rights and throwing that area to the extent it has to exist to the state courts and the legislatures? Was, and please don't take offense, was ideology becoming a factor rearing its head and intruding into the decisional process to a greater extent than before? Does the Court basically dislike fee shifting statutes? Look at the case of ?Dag Lee? on that subject. To what extent was the presence of an election year a factor? And yet, I have been there long enough to know, have gone through several other election years and we survived but I think maybe it is a factor. Does the public's hunger for knowledge about the Court enhance the urgency of the situation? I sense this everywhere that Dottie and I go--whether we are at a law school or a college or a bar association meeting. People are hungry for knowledge as to how the Court works and it comes through very clearly that this is the least known of the three branches of government and yet as * * * said it is the most open and one can find out about it if he just will. Is the confirmation process as presently followed through the Clarence Thomas hearing something in need of restructuring? Perhaps along the line suggested by Senator Paul Simon in his latest book, I think it is published, I am not sure, and if so should it apply to all levels of federal judges? It was bad enough when I went through in 1970. I will never forget it. Perhaps * * * a little bit because as I mentioned every year I was good old number three and not number one. As indeed was Tony Kennedy. But then he and I remember that Joseph Story was good old number four and beat us by one. The fourth choice of the President at that time. Was the

move of several states, Florida, Georgia, Texas, Louisana, Virginia, toward carrying out the death penalty a deadening factor? In contrast, California has had just one execution recently despite the number of people on death row.

Again, some personal comments, and you may resent these. I for one, for one as a citizen have a hope and a wish that the election process this year will be less dirty and less full of innuendos and that wish, I suppose, I must concede as a forlorn one if history is to be any guide. Presidential candidates of the past have been subjected to ridicule and falsehoods and plan old fashioned unfairness and one need only look at the Lincoln election years of 1860 and 1864 to realize this and yet I think I have a right as a citizen to my hope and my wish for something better. Politics do not need to be that way. I think we can avoid the tactics of the street lily. In any event, I take comfort in the fact that the American people usually can see through such tactics and judge them for what they are. This country deserves the best it seems but often has to make do with something less than the best.

Again, don't misunderstand me when I say this one. One year ago at the Colorado Springs Conference Hillary Clinton filled a part on the program immediately prior to my comments and those of you who where there will recall her performance. How articulate she was and how well she was received and in a preference to my remarks I laughingly told her that she could be my candidate for president any time and now see where she is--the spouse of the democratic nominee and in the midst of a strenuous campaign and those of you from Arkansas and indeed all of us, I think can be proud of the accomplishments of these two members of the Conference and of the bar of a state within the Eighth Circuit. I am not talking politics, I am just taking a bow in the direction of a very articulate and able young woman.

A comment about the death penalty. You are in a state, Minnesota, which hasn't had an execution since before 1920. We were confronted with the execution of ?Robert Alton Harris? in

California who was executed on the 22nd day of April. The first in California in twenty-five years. The 169th person since 1976 when our Court upheld some of the death penalty state provisions. California has 330 over that on death row. Twenty-five hundred in the nation. The states that are moving ahead as I indicated a minute ago are Florida, Texas, Louisana, Virginia, and Georgia and I suppose one can say if we are going to have the death penalty, let's enforce it. Let's get rid of this seven to ten to fifteen year delay after the crime before the penalty is imposed. And then we had that extraordinary order of May 22 on the Harris case by our Court stating that no further stay could be issued by any federal judge within the Ninth Circuit, district or court of appeals judge, without specific approval of the Supreme Court of the United States. Delay, of course, was a factor, but an extraordinary order. How proper, is for you to judge.

I have not joined Brennan and Marshall on the Eighth Amendment. They feel the death penalty is a violation of the Eighth Amendment. I have taken the position that if the state wants it, it is entitled to have it provided it is properly and fairly administered but I have reached the point, because I know from the Minnesota experience that there is no deterrent factor in capital punishment whatsoever and so it gets down to retribution. And I think that that is all that is left and I have concluded that every time we executive somebody we are all lessened in stature. Certainly that was true with the Harris execution and the McClusky execution and the trouble with Harara. Grizzly business. Consider what Europe has done.

A number of you repeatedly ask about Justice Thomas. He is generally, I am sure he won't object to my saying this, he is generally silent on the bench and asks very few questions even as I am generally silent. We leave the questions to Justice Scalia and some of the others. This is typical of a junior * * * and if you don't ask any questions, you won't ask any foolish questions. Good advice. On the other hand, Justice Thomas has not been reticent in his writings as the Solicitor General indicated. He

has written more than a junior usually does but there is nothing wrong with that. And he has had able clerks. One of them being a former clerk of Justice Scalia. And he generally votes as you well know with Justice Scalia although there are exceptions. In the Kasey case he took the position to overrule Roe against Wade. On a one-to-one basis, Clarence Thomas tries earnestly and hard to be pleasant and he surely is trying to be an effective justice. It is tough. If any of you or I had had to go through what he went through, it is tough.

Some of you ask about Justice Souter. In my estimation he has blossomed in his second year on the bench. From my own experience it takes time to be comfortable in that Court. It took me five years and I am not so sure I am comfortable now. He is conservative but he is independent and one must respect that. He told me what we must all learn, that after struggling all last year he finally reached the point that the appointing President had expressed confidence in him and that all one can do is to do one's best. And how true that is. For any of you new to the federal bench in any capacity, don't worry about your ability, do your best and it will all come out all right. Dottie and I feel that David Souter is a charming person and this circuit would be privileged to have him at a future Conference. You would be delighted with him. You would like his New Hampshire humor. Dottie and I have also concluded that perhaps he is the only normal person on the Supreme Court. I won't expand on that.

Well, observations about the term--the Solicitor General may not agree with me on these although his analysis was superb, I thought. There was the same wild and hectic final weeks. We have the rule as you know, it has been there for some time now, that we do not go into summer recess until everything that has been argued is out or set for reargument. And then the Chief Justice also establishes targets--all majorities by June 1, all dissents by June 15. And generally we adhere to that target although one can argue that it makes for second-rate opinions and that it creates more work because get it out in any old shape and we will fix it up

later and then I get a second draft which says substantially rewritten. Well if I have read the first draft I have wasted time and I have to go over the second draft. But is this final flurry every year no matter how many cases we have endemic to the system? Chief Justice Rehnquist believes it is and maybe so.

Character of the term--I think this is a little hard. I can't do it as well as the Solicitor General did. In a way it was a bankruptcy term. We had more bankruptcy cases this year I think than in all of my twenty-one years before and it is characteristic, evidence perhaps of the state of the economy. I mentioned the election overtones. Certainly First Amendment as General Starr indicated with the school prayer case and * * * which will be reargued and Krishna. Scattered voting, fractured voting. I think we still write much too much. Our friends on the European courts of course don't understand this business. Particularly in Germany they bring a case down and if there are dissents, they are not noted. And why do we engage in all this writing. It is much easier to write and it is much easier to write at length than it is not to write and to write briefly. I think it is a continuation of the year before. The move to the right is, I think, somewhat evident with a hardening of attitude toward criminal and inmate claims. Alvarez Machain, the kidnapping case, the case on abused children, ?Tamayo? race and the cutting back on the availability of federal habeas, a greater emphasis on property rights and business considerations evidenced by Quill and by Lucas against the South Carolina Coastal Corporation and yet, and yet, there was Hudson against McMillian concerning 1983 and a little beating, not a big beating of an inmate but a little beating and the Court said the cause of action would lie but note the dissent and the strength of its language.

There was the case concerning the defense use of preemptories that the Solicitor General mentioned. There was Lee against Wiseman, the school prayer case. There was Kasey. There was Riggins against Nevada with forced medication. There was U.S. against Fortas, the Mississippi schools and there was Fuchay

against Louisiana, the retention on dangerousness alone. All indicating not a hardening of the attitude. So, in a way, I suppose, depending on one's point of view, one can say it was not a term going in this direction or that direction but it was not a bad term and went down somewhat in the center.

Forecast, I think we will see more of the same. The so-called conservative Justices clearly are in control if they want to exercise it and I put in that category the Chief Justice, and Byron White and Nino Scalia, and David Souter and Clarence Thomas and plus Tony Kennedy on occasion and of course I always say for Byron White you get into a race case and the Kennedy influence will prompt him perhaps to go the other way.

I think the conservatives are aware of this and that they could take hold whenever they wish but so far they haven't done so as a matter of routine. It will be this way until the middle of the twenty-first century anyway and you might bear in mind that only one Justice on that Court has been appointed by a democratic president. One. And that is Byron White. All the rest by republican presidents. And perhaps this is in mind with the mood of the country. You would know that better than I do. I am not saying it is bad. It is the nature of the system. The pendulum eventually does swing.

Well, let me say some comments you may not agree with again. On the 9th day of June 1970 I walked after taking my oath into the conference room and there were the eight assembled. Hugo Black, William O'Douglas, John Marshall Harland, William J. Brennan, and I said to myself, what am I doing here? And I still wonder. And a lot of people in this country including a lot here probably wonder what I am doing there too. But the years have been interesting. They haven't been much fun but it is a fascinating experience to exercise that privilege. It is the hardest job I have ever had. I thought I worked hard in practice and I thought I worked hard a Mayos and I thought I worked hard in the court of appeals, but this is tough. It is competitive, it is lonely, and I am amused by the transformation the media makes of the Minnesota

Twin so-called to a flaming liberal on the left. John Paul Stevens and I have a lot of fun with that one being appointed by republican presidents but it has been a great privilege and thanks are due from me for that opportunity to the appointing president, to my colleagues, and to you, and past members of the Eighth Circuit who prepared me as best one like me could be prepared.

There have been personal costs, of course--costs to Dottie, costs to our family. The criticism and the abuse, some pleasant and some not so pleasant. The absence of a normal retirement as the years have advanced. The impingement upon some otherwise personal friendships. But a major source of support has been this court of appeals and the associations it has entailed. I cannot name them all and I will name them only by their first names, John and Martin and Harvey and Charlie, two of them, and Floyd and Don and Richard and Pat and Gerry, Ed Devitt, John De La Hunt, John Miller, Gordon Young, Bill Becker, Gunner Nordby, Roy, George, registered persons of the law. Interested in the law and its proper application. Irrespective of democratic or republican background. Dottie and I for over twenty years now have lived in a second, secondary, I will put it that way, apartment on the Virginia side of the Potomac River. She hasn't been too pleased with it and I can understand it but we stayed there because for me it has two advantages. The first is the proximity to the court. It is convenient in this respect and I usually can get to work in fifteen to twenty-five minutes even at the height of Washington traffic. But the second advantage is the outlook, particularly at night. From our small balcony we look directly to the east across the river. Theodore Roosevelt Island lies between us and the Kennedy Center and the Watergate Complex and off to the left is Georgetown and the University there and on the hill sits the National Cathedral and directly ahead in the far distance is a national shrine of the immaculate conception. And slightly to the right is the Washington Monument lit up at night so that the markings where construction stopped during the war between the states are clearly visible. And farther to the right is the

Lincoln Memorial and still farther is the Jefferson and the title basin and the cherry trees. I like that view. I depend upon it. It is always there, day and night. Friendly and warm in good weather and in bad. There is a certain comfort about it. I have heard some young people, however, when they see it, say there is the center of power and I want to be a part of it. And then there are others who say, there is the center of power but while I would like to be a part of it, I would do what I could to confine it properly and to make it work as it was intended to work.

Do you share with me a concern about our standards, professional and otherwise these days? I think that is why you had the theme of this Conference professionalism. Are you bothered at all by the current emphasis in the legal profession upon the bottom line, on billable hours, on paying bright, young law clerks a bonus to sign up with a firm just as a bonus is paid to a ball player after a 237 batting average year when he signs his next contract? And upon the evident reluctance in many quarters to engage in pro bono work as Justice Simonett pointed out this morning, upon some forms of lawyer advertising are you concerned about the interest in some quarters of the medical profession with intake about that profession's lapses in patience confidence and about the proliferation of malpractice suits? And are you concerned about the wretched events that took place in Los Angeles beginning April 29? Now weeks later we cannot escape the grip and the significance of those events and what they hold for all of us in the months and years ahead. Indeed it seems as though the entire world, the Far East, the Middle, African and South American and Europe and here is in turmoil. Man's inherent inhumanity to man. Can we possibly rise above it and see to it that the flowering of new life somehow will rise as it always has before from the ashes of old disasters. Are you concerned with the blight of continued racism and anti-semitism in this country? Nothing has convinced me that racism is not all about us still and at times seems to be growing stronger and more ugly. We sense it in this election year as it creeps into the open. Are you concerned about continued sex discrimination in

our society? Sexual harassment has been with us a long, long time. Will we ever get rid of it? Do we really want to?

Are you concerned with what seems to me at least to be the lessening influence of your Supreme Court as the bastion for the protection of human rights and of civil rights and for sensitive interpretation of constitutional provisions especially those of the first ten amendments? On July 14, ten days ago, Dottie and I and our oldest daughter were in the city of Berlin. And we stopped at the so-called Memorial House of the ?Von Ce Von Ca Conference?. Fifty years ago in January 1942 ?Reinhardt Heidrich,? head of the national socialst reich central security office, chaired a meeting in that villa of fourteen high ranking civil servants and SS officers. The decision to murder European Jews had been made earlier but the Von Ce Conference was concerned with the implementation of the final solution so-called, that is the decision to import the Jews of Europe to the east for extermination. Think of it. In 1947 the minutes of that conference recorded by ?Adolf Eichman? were found in the files of the German foreign office. That memorial is not yet complete. But the photograph exhibit there is. We wandered through the several rooms containing the photographs and sustained the anticipated chill of what went on. Despite economic adversity in pre-war Germany and despite the general weakness of the then existing government, it is not easy to accept the fact that a small faction of zealots could have organized a thriving busy people and implemented them to their own evil designs. And this teaches me again that the line between the fright of despotism and freedom is a narrow one and very fragile. And this takes me once again to the words of Edmond Conn, I have quoted them on occasions before, let me quote them here. Almost thirty years ago in 1963, Professor Conn at New York University edited a book called the great rights and the closing lines of that book state what for all of us ought to be the obvious. "Freedom is not free. Shaping and preserving a new kind of society necessarily involves personal commitment, costly risk and constant effort. The cultivation of civil liberty

can be no more passive than the cultivation of a farm. A man can inherit the land on which he lives. He can even inherit the first crop of produce after he takes over. But then if he stops everything stops and begins to crumble." I have lost my page, but he goes on to say that, "for freedom we must exercise constant care and constant attention." And that I think and submit is the formula. That is the charge upon us as federal judges, as citizens, as Americans. Constant care for this little instrument and what it means. Constant attention to it. We had better be up to it and the question of course is whether we are.

Thank you again for letting me be here.